

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Feb 18, 2022**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MARTHA L.,<sup>1</sup>

Plaintiff,

v.

KILOLO KIJAKAZI, Acting  
Commissioner of Social Security,

Defendant.

No. 4:21-cv-5002-EFS

**ORDER GRANTING PLAINTIFF'S  
SUMMARY-JUDGMENT MOTION,  
DENYING DEFENDANT'S  
SUMMARY-JUDGMENT MOTION,  
AND REMANDING FOR FURTHER  
PROCEEDINGS**

Plaintiff Martha L. appeals the denial of benefits by the Administrative Law Judge (ALJ). Because the ALJ improperly discredited Plaintiff's mental-health symptoms primarily on the grounds that she did not seek more aggressive mental-health treatment and the ALJ failed to develop the record, the Court grants Plaintiff's Motion for Summary Judgment, ECF No. 19, denies the Commissioner's Motion for Summary Judgment, ECF No. 22, and remands this matter for further proceedings.

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<sup>1</sup> To protect the privacy of the social-security Plaintiff, the Court refers to her by first name and last initial or as "Plaintiff." *See* LCivR 5.2(c).

1                                   **I.       Factual and Procedural Summary**

2           Plaintiff filed a Title 2 application.<sup>2</sup> Her claim was denied initially and on  
3 reconsideration.<sup>3</sup> On request, an administrative hearing was then held by  
4 telephone before ALJ Jesse Shumway, who took testimony from Plaintiff.<sup>4</sup>

5           After the hearing, the ALJ issued a written decision denying Plaintiff's  
6 disability claim because—although she had the following medically determinable  
7 impairments of obesity, gastroesophageal reflux disorder, hypothyroidism, lumbar  
8 strain, bipolar disorder, and generalized anxiety disorder—none of these  
9 impairments, individually or collectively, were severe.<sup>5</sup> There were no treating or  
10 examining opinions of record, but the ALJ found persuasive the reviewing medical  
11 opinions finding that Plaintiff did not have a severe physical or mental  
12 impairment.<sup>6</sup> The ALJ also found Plaintiff's medically determinable impairments  
13 could reasonably be expected to cause some of the alleged symptoms, but her  
14 statements concerning the intensity, persistence, and limiting effects of those  
15 symptoms were not entirely consistent with the record.<sup>7</sup> The ALJ found the  
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17       <sup>2</sup> AR 173–77.

18       <sup>3</sup> AR 90–104.

19       <sup>4</sup> AR 31–60.

20       <sup>5</sup> AR 12–28.

21       <sup>6</sup> AR 22–23.

22       <sup>7</sup> AR 20–22.

1 statements from Plaintiff's husband and daughter did not provide significant  
2 additional detail beyond that found in Plaintiff's allegations.<sup>8</sup>

3 Plaintiff requested review of the ALJ's decision by the Appeals Council,  
4 which denied review.<sup>9</sup> Plaintiff timely appealed to this Court.

## 5 II. Standard of Review

6 A court's review of the Commissioner's final decision is limited.<sup>10</sup> The  
7 Commissioner's decision is set aside "only if it is not supported by substantial  
8 evidence or is based on legal error."<sup>11</sup> Substantial evidence is "more than a mere  
9 scintilla but less than a preponderance; it is such relevant evidence as a reasonable  
10 mind might accept as adequate to support a conclusion."<sup>12</sup> Moreover, because it is  
11 the role of the ALJ—and not the court—to weigh conflicting evidence, the court  
12 upholds the ALJ's findings "if they are supported by inferences reasonably drawn  
13 from the record."<sup>13</sup>

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16 <sup>8</sup> AR 21.

17 <sup>9</sup> AR 1–11.

18 <sup>10</sup> 42 U.S.C. § 405(g).

19 <sup>11</sup> *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

20 <sup>12</sup> *Id.* at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).

21 <sup>13</sup> *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012); *Lingenfelter v. Astrue*, 504  
22 F.3d 1028, 1035 (9th Cir. 2007) (The court considers the entire record as a whole,  
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Further, the court may not reverse an ALJ decision due to a harmless error—an error that is inconsequential to the nondisability determination.<sup>14</sup> The party appealing the ALJ’s decision generally bears the burden of establishing harm.<sup>15</sup>

### III. Analysis

#### A. Symptom Reports: Plaintiff establishes consequential error.

Plaintiff argues the ALJ failed to provide valid reasons for discounting her symptom reports. When examining a claimant’s symptoms, the ALJ utilizes a two-step inquiry. “First, the ALJ must determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged.”<sup>16</sup> Second, “[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant’s testimony about the severity of the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the rejection.”<sup>17</sup> General findings are insufficient;

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not simply the evidence cited by the ALJ or the parties.) (cleaned up); *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998).

<sup>14</sup> *Molina*, 674 F.3d at 1111, 1115.

<sup>15</sup> *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

<sup>16</sup> *Molina*, 674 F.3d at 1112.

<sup>17</sup> *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting *Lingenfelter*, 504 F.3d at 1036).

1 rather, the ALJ must identify what symptom claims are being discounted and what  
2 evidence undermines these claims.<sup>18</sup> “The clear and convincing standard is the  
3 most demanding required in Social Security cases.”<sup>19</sup> Therefore, if an ALJ does not  
4 articulate specific, clear, and convincing reasons to reject a claimant’s symptoms,  
5 the corresponding limitations must be included in the RFC.<sup>20</sup>

6 Factors to be considered in evaluating the intensity, persistence, and  
7 limiting effects of a claimant’s symptoms include: 1) daily activities; 2) the location,  
8 duration, frequency, and intensity of pain or other symptoms; 3) factors that  
9 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and  
10 side effects of any medication the claimant takes or has taken to alleviate pain or  
11 other symptoms; 5) treatment, other than medication, the claimant receives or has  
12 received for relief of pain or other symptoms; 6) any non-treatment measures the  
13 claimant uses or has used to relieve pain or other symptoms; and 7) any other  
14 factors concerning the claimant’s functional limitations and restrictions due to pain  
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17 <sup>18</sup> *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995), and *Thomas v.*  
18 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently  
19 explain why he discounted claimant’s symptom claims)).

20 <sup>19</sup> *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r*  
21 *of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

22 <sup>20</sup> *Lingenfelter*, 504 F.3d at 1035.  
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1 or other symptoms.<sup>21</sup> The ALJ is instructed to “consider all of the evidence in an  
2 individual’s record” to “determine how symptoms limit ability to perform work-  
3 related activities.”<sup>22</sup>

4 At the hearing, Plaintiff testified that her anxiety affects her ability to work  
5 because she is unable to concentrate and focus, and that she has some good days  
6 and some bad days and it is difficult to know how her anxiety and depression will  
7 be until she wakes up each day.<sup>23</sup> She testified that on her good days she can do  
8 housework, laundry, and housecleaning, but that on her bad days, she cannot do  
9 anything and she requires her two stepsons and husband to help with her six-year-  
10 old daughter and housework.<sup>24</sup> She testified that she has about three bad days a  
11 week.<sup>25</sup> She has trouble sleeping every night and gets overwhelmed.<sup>26</sup>

12 The ALJ found Plaintiff’s statements concerning the intensity, persistence,  
13 and limiting effects of her medically determinable impairments not supported by  
14 her course of treatment, inconsistent with her level of activity, not supported by  
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17 <sup>21</sup> SSR 16-3p, 2016 WL 1119029, at \*7; 20 C.F.R. §§ 404.1529(c), 416.929(c).

18 <sup>22</sup> SSR 16-3p, 2016 WL 1119029, at \*2.

19 <sup>23</sup> AR 44–48.

20 <sup>24</sup> AR 46.

21 <sup>25</sup> AR 50.

22 <sup>26</sup> AR 49–50.

1 her reports to medical providers, and inconsistent with the objective medical  
2 evidence.<sup>27</sup>

3 1. Course of Treatment

4 A claimant's course of treatment, including an inadequately explained  
5 failure to seek treatment, is a relevant factor for the ALJ to consider when  
6 assessing the claimant's symptom reports.<sup>28</sup> Yet, the ALJ must discuss whether the  
7 claimant's articulated reasons for not seeking treatment constitute good cause for  
8 not doing so.<sup>29</sup>

9 Here, the ALJ found Plaintiff:

10 testified she is able to pay for psychiatric services and fill her  
11 medications, and her husband works full-time, so she demonstrates  
12 the financial capacity to seek appropriate treatment. . . [S]he and her  
13 husband have not spoken about adding her to his insurance policy,  
and she admitted she has not looked for a counselor who might see  
her at reduced or no cost.<sup>30</sup>

14 Because Plaintiff did not seek more aggressive treatment, the ALJ discounted her  
15 symptom reports.<sup>31</sup>

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17 <sup>27</sup> AR 21–23.

18 <sup>28</sup> 20 C.F.R. § 404.1529(c)(3).

19 <sup>29</sup> *Fair v. Bowen*, 885 F.2d 597, 603-04 (9th Cir. 1989); SSR 16-3p: Titles II and  
20 XVI: Evaluation of Symptoms in Disability Claims.

21 <sup>30</sup> AR 21.

22 <sup>31</sup> AR 21.

1 Contrary to the ALJ's finding, the record contains evidence that Plaintiff had  
2 financial challenges obtaining medical care, namely mental-health counseling and  
3 fully paying for medication. Plaintiff testified that she would "love to see a  
4 counselor but again, no insurance" and that the household income was insufficient  
5 to pay for all of her medications and she instead relied on free medication samples  
6 from her care provider or she went without migraine medication.<sup>32</sup> Consistent with  
7 Plaintiff's testimony, the medical records indicate that her treating provider gave  
8 her free sample boxes of mental-health medication on at least three occasions and  
9 that, although she was interested in participating in counseling, she declined  
10 participating in counseling because she was unable to pay for it.<sup>33</sup> In addition, her  
11 husband and daughter submitted letters offering similar testimony. For instance,  
12 her husband wrote, "As of right now she is only seeing her doctor once every two  
13 months because that is all we can afford at the time. We pay cash because [she]  
14 doesn't have health insurance, we simply cannot afford it."<sup>34</sup>

15 On this record, the ALJ's finding that Plaintiff "demonstrates the financial  
16 capacity to seek appropriate treatment" is not a clear and convincing reason  
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19 <sup>32</sup> AR 52–58.

20 <sup>33</sup> AR 401, 406, 410 (noting that samples of Rexulti were given to patient); AR 416  
21 ("[S]he still has no insurance coverage so she is hesitant to resume counseling.").

22 <sup>34</sup> AR 299; *see also* AR 300.  
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1 supported by substantial evidence.<sup>35</sup> There is no evidence supporting the ALJ's  
2 conclusion that since Plaintiff's husband worked full-time, they had the financial  
3 capacity to pay for additional mental-health treatment for Plaintiff, even if  
4 Plaintiff was named as an insured. In addition, contrary to the ALJ's finding that  
5 Plaintiff and her husband had not spoken about adding her to his work insurance,  
6 Plaintiff's testimony was that she had talked with her husband, who makes the  
7 family's financial decisions since she has difficulties handling finances due to her  
8 conditions, when he first obtained his work medical insurance and that he told her  
9 it was too expensive to add her to the insurance.<sup>36</sup> In addition, Plaintiff testified  
10 that her husband had looked into getting health insurance through the state but  
11 they either did not qualify or it was too expensive. There is no evidence in the  
12 record contradicting this testimony.

13 The ALJ also discounted Plaintiff's symptoms because she did not inquire as  
14 to whether she could get free mental health counseling. While affordable or free  
15 local community resources may be a relevant factor for the ALJ to consider when  
16 determining whether a claimant had good cause for not seeking additional  
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18 <sup>35</sup> AR 21.

19 <sup>36</sup> AR 56–59. *See also* AR 255–56 (stating that it is “to stressful to pay bills,  
20 overwhelming and no desire to keep track of what’s happening with the [bank]  
21 account” and she can’t keep tract [sic] of financial information, my husband does all  
22 of our banking”).  
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1 treatment, the ALJ must consider whether such resources are likely available to  
2 the claimant.<sup>37</sup> Here, the ALJ did not discuss what local community resources were  
3 available that Plaintiff did not seek, and there is no indication in the medical  
4 record that Plaintiff's treating provider educated her about low cost or free mental  
5 health counseling.

6 On this record, the ALJ's finding that Plaintiff's course of treatment did not  
7 support her mental-health symptoms is not supported by clear and convincing  
8 reasons supported by substantial evidence.

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10 <sup>37</sup> See SSR 16-3p: Titles II and XVI: Evaluation of Symptoms in Disability Claims  
11 (requiring the ALJ to consider whether the individual is unable to afford treatment  
12 and does not have access to free or low-cost medical services). See, e.g., Program  
13 Operations Manual System (POMS) 23010.011, How to Make a Failure to Follow  
14 Prescribed Treatment (FTFPT) Determination (eff. Jan. 3, 2019) ("Follow your local  
15 business process to identify potential local community resources (i.e., clinics,  
16 charitable organizations, public assistance agencies). In most states, this means  
17 you must consult with the DDS public relations officer (PRO), and the PRO will  
18 consult directly with the individual regarding any potential assistance."); SSR 18-  
19 3p: Titles II and WXVI: Failure to Follow Prescribed Treatment (placing the  
20 burden on the claimant to demonstrate why she does not have health insurance to  
21 pay for the prescribed treatment or why she failed to obtain treatment at the free  
22 or subsidized healthcare provider *if such is available*) (emphasis added).

1           2.     Activities of Daily Living

2           The ALJ also discounted Plaintiff's symptoms because her level of activity  
3 did not support her allegations. If a claimant can spend a substantial part of the  
4 day engaged in pursuits involving the performance of exertional or non-exertional  
5 functions, the ALJ may find these activities inconsistent with the reported  
6 disabling symptoms.<sup>38</sup> Here, relying largely on the statements in Plaintiff's Adult  
7 Function Report and some hearing testimony, the ALJ found Plaintiff's ability to  
8 perform chores such as cleaning and laundry, prepare meals, drive, shop in public  
9 stores for necessities, handle some finances, and provide childcare for a minor child  
10 did not support Plaintiff's allegations.<sup>39</sup> Yet, the ALJ failed to meaningfully explain  
11 how these activities, many of which can be done in small time increments and at  
12 Plaintiff's pleasure, were inconsistent with Plaintiff's testimony that when she has  
13 good days she is able to perform her daily activities and care for her child and when  
14 her anxiety and depression are bad she is unable to do such activities.<sup>40</sup> The ALJ

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16 <sup>38</sup> *Molina*, 674 F.3d at 1113.

17 <sup>39</sup> AR 21 (citing AR 254–55).

18 <sup>40</sup> *See Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001) (The Ninth Circuit  
19 has “repeatedly asserted that the mere fact that a plaintiff has carried on certain  
20 daily activities, such as grocery shopping, driving a car, or limited walking for  
21 exercise, does not in any way detract from h[is] credibility as to h[is] overall  
22 disability.”).

1 also did not discuss Plaintiff's testimony that on her bad days she has help caring  
2 for her child from her stepsons and husband. Without further explanation,  
3 Plaintiff's level of activity does not serve as a clear and convincing reason to  
4 discount her symptom reports.

5 3. Inconsistent Statements and Observations

6 The ALJ also discounted Plaintiff's symptoms because her "contemporaneous  
7 reports to medical providers" and normal mental status examinations did not  
8 support her allegations.<sup>41</sup> An ALJ may discount a claimant's symptom reports on  
9 the basis of inconsistent statements.<sup>42</sup> But the ALJ must be mindful as to whether  
10 a claimant's conflicting symptom reports or exaggerated symptoms were caused by  
11 the claimant's impairments.<sup>43</sup> Here, the ALJ did not cite any evidence to support  
12 this particular finding as to inconsistent statements. However, in a latter portion of  
13 the decision, the ALJ states, "treatment notes do not contain allegations of  
14 forgetfulness or memory problems"; "self-isolation is not reported in the medical  
15 record"; that Plaintiff reported that her paranoia "improved with treatment"; and  
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17 <sup>41</sup> AR 21.

18 <sup>42</sup> *See Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (The ALJ may consider  
19 "ordinary techniques of credibility evaluation," such as reputation for lying, prior  
20 inconsistent statements concerning symptoms, and other testimony that "appears  
21 less than candid.").

22 <sup>43</sup> *See Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017).  
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1 “[s]he denied concentration problems at treatment visits.”<sup>44</sup> The challenge with the  
2 ALJ’s finding is that he relied largely on medical records for Plaintiff’s physical  
3 conditions, rather than mental-health treatment records, such as the medication  
4 management records. The medication management records indicate that Plaintiff  
5 was observed as anxious, with dysphoric mood, and as hypomanic with depressive  
6 symptoms, and that she reported low energy and motivation.<sup>45</sup> Without a more  
7 meaningful discussion addressing relevant mental-health records, the ALJ’s  
8 decision to discount Plaintiff’s symptoms because they were inconsistent with her  
9 reports to care providers and normal mental status examinations during  
10 appointments largely for physical conditions lacks a clear and convincing reason  
11 supported by substantial evidence.

12 4. Consequential Error

13 These errors permeated the ALJ’s entire consideration of Plaintiff’s symptom  
14 reports, as is reflected by the ALJ’s finding that her “passive approach to [mental  
15 health] treatment. . . undermines her allegations of serious symptoms.”<sup>46</sup> And the  
16 ALJ’s discounting of Plaintiff’s symptoms reports resulted in an RFC that was less  
17 restrictive than Plaintiff’s reported symptoms.

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19 <sup>44</sup> AR 22 (citing AR 358 (“less paranoia”), AR 428 (treatment note for weight loss  
20 management), AR 433 (treatment note for epigastric pain)).

21 <sup>45</sup> AR 357, 381, 386, 403, 407, 411, 415.

22 <sup>46</sup> AR 21.

1 **B. Duty to Develop the Record**

2 Although Plaintiff's counsel advised the ALJ at the hearing that he was  
3 awaiting receipt of an opinion from the psychiatrist who managed Plaintiff's  
4 medication, Plaintiff's counsel did not submit the psychiatrist's opinion along with  
5 the required "more robust explanation" for why it would be submitted late.<sup>47</sup>

6 If the ALJ did not accept a late opinion from Plaintiff's treating source, then  
7 the ALJ on this record erred by not developing the record by ordering a  
8 psychological examination. This record contains no mental-health opinion from a  
9 treating or examining psychologist, but it is apparent based on the medication  
10 management records that Plaintiff was impacted by her mental-health conditions.

11 "The ALJ always has a special duty to fully and fairly develop the record" in  
12 order to make a fair determination as to disability, even where, as here, "the  
13 claimant is represented by counsel."<sup>48</sup> This "affirmative responsibility to develop  
14 the record"<sup>49</sup> is necessary to ensure that the ALJ's decision is based on substantial  
15 evidence.

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<sup>47</sup> AR 15.

21 <sup>48</sup> *Celaya v. Halter*, 332 F.3d 1177, 1183 (9th Cir. 2003) (cleaned up).

22 <sup>49</sup> *Id.* at 1184.  
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1           On this record, without a treating or examining mental-health opinion, the  
 2 Court “cannot conclude that the ALJ’s decision was based on substantial evidence .  
 3 . . [when taking] the totality of [the claimant’s] mental conditions into account.”<sup>50</sup>

4 **C. Remand for Further Proceedings.**

5           Because either a treating or examining opinion is necessary, further  
 6 proceedings are necessary before a determination can be made about Plaintiff’s  
 7 eligibility for benefits.<sup>51</sup> If a psychological examination is ordered, the examiner  
 8 must be given sufficient medical records to allow for a longitudinal perspective.<sup>52</sup>  
 9 The ALJ may also consider supplementing the record with an opinion from a  
 10 treating provider. Once the new opinion(s) are available for the ALJ’s review, the  
 11 ALJ is to reevaluate Plaintiff’s eligibility for benefits.

12 **IV. Conclusion**

13 Accordingly, **IT IS HEREBY ORDERED:**

- 14 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 19**, is  
 15 **GRANTED.**

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 18 <sup>50</sup> *Id.*

19 <sup>51</sup> *Tonapetyan v. Halter*, 242 F.3d 1144, 1150–51 (9th Cir. 2001); *Leon v. Berryhill*,  
 20 800 F.3d 1041, 1045 (9th Cir. 2017).

21 <sup>52</sup> If a consultative examination is ordered, the examiner is to append the records  
 22 that the examiner reviewed to the report or clearly identify the records reviewed.  
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1           2.     The Commissioner's Motion for Summary Judgment, **ECF No. 22**, is  
2                 **DENIED.**

3           3.     The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff  
4                 **REVERSING and REMANDING** the matter to the Commissioner of  
5                 Social Security for further proceedings pursuant to sentence four of 42  
6                 U.S.C. § 405(g).

7           4.     The case shall be **CLOSED.**

8                 **IT IS SO ORDERED.** The Clerk's Office is directed to file this Order and  
9     provide copies to all counsel.

10           **DATED** this 18<sup>th</sup> day of February 2022.

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13                                 EDWARD F. SHEA  
                                      Senior United States District Judge